No. 12,425

IN THE

United States Court of Appeals

For the Ninth Circuit

UNITED STATES OF AMERICA,
Appellant,

vs.

WALTER L. PENDERS,
Appellee.

BRIEF FOR APPELLEE.

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FOREWORD.

Appellant has not put in its opening brief anything hat purports to be a statement of facts proven upon he trial. In lieu of such a statement it has selected solated portions of the testimony referring only to uch thereof as is favorable to its contention and ig-oring the testimony which supports the findings and udgment of the trial Court. From these selected ex-erpts and from its own conclusion as to what the udgment of the trial Court should have been, it rgues that the findings of fact find no support in he evidence and that appellee was guilty of contribu-

(NOTE): All numerals in parentheses refer to pages in Tran-cript of Record, unless otherwise noted. Italics ours unless other-ise noted.

tory negligence as a matter of law. In so doing, appellant ignores the rule that conflicts in testimony cannot be resolved by this Court. However, it does concede that the trial Court's findings cannot be disturbed upon appeal unless there is clear and convincing evidence showing that the same are not supported by the evidence. It also ignores the rule that where evidence, even though conflicting, supports the findings and judgment of the trial Court, the Appellate Court will not order a reversal. Furthermore, it is an elementary rule in appeal procedure that an appellate tribunal must take the view of the evidence and the inferences deducible therefrom which is most favorable to the appellee.

The rules herein mentioned are set forth in full in the following cases:

Bellon v. Silver Gate Theatres, Inc., 4 Cal. (2d) page 1, at pages 13 and 14;

Cleo Syrup Co. v. Coca-Cola Co., 139 Fed. (2d) 416.

Like language may also be found in

Jacoby v. Johnson, 84 Cal. App. (2d) 271;

Crawford v. Southern Pacific, 3 Cal. (2d) 422, 429,

both of which cases are cited by appellant in its opening brief. Appellee is entitled to have a fair statement of facts which supports the findings and judgment of the trial Court. Appellee will endeavor to present a condensed statement of facts supported by the record in this particular case to show that the negligence of the appellant, as well as the alleged

contributory negligence of appellee, if any, was a question of fact for the trial Court.

STATEMENT OF FACTS.

The trial Court gave judgment for appellee in the sum of fifty-three thousand ninety-eight and 68/100 dollars ($53,098.68) as damages sustained by appellee as a result of the negligent operation of appellant's automobile, as computed in the order for judgment appearing on page 18 of the transcript of record.

On May 11, 1946, about 6:40 P.M., Walter Penders was driving his automobile in an easterly direction on Fremont Street, in the City of Monterey, California, approaching the intersection of that street with Park Avenue. At that time Walter Penders was accompanied by his wife and two other passengers (Tr. p. 205). At the same time one Carl W. Wanless, a soldier in the U. S. Army was operating a Government owned automobile along Fremont Street in a westerly direction approaching the intersection of that street with Park Avenue.

Fremont Street is a four-lane highway with a white center line dividing the eastbound and westbound lanes (see Defendant's Exhibit "A"). Approaching east towards Park Avenue, Fremont Street ascends a grade of approximately ten per cent (10%) (Tr. p. 104), and then turns to the left at the crest of the grade (Tr. p. 104). The crest of the grade is about one hundred and fifty-five (155) feet east of

the center line of Park Avenue (Tr. p. 196). Park Avenue is just below the crest of the grade. East of Park Avenue Fremont Street is a four-lane highway with the northerly westbound lane abutting the edge of the sidewalk curbing (Tr. p. 200). West of Park Avenue, between the northerly paved portion of Fremont Street and the sidewalk curbing there is an unimproved gravel shoulder, approximately sixteen feet wide (Tr. p. 200). Because of the contour of the roadway of Fremont Street, one driving an automobile westerly on Fremont Street could not see an automobile in the intersection of Park Avenue and Fremont Street beyond one hundred and fifty-five (155) feet (Tr. p. 193). From a point approximately one hundred and fifty-five (155) feet east of the center line of Park Avenue one has a clear view of Fremont Street.

Appellee on the day in question was driving about twenty (20) miles per hour easterly on Fremont Street and when opposite Park Avenue proceeded to make a left hand turn into Park Avenue (Tr. pp. 209, 210). Before making his left hand turn appellee had extended his arm from the automobile which he was operating, indicating his intention to make said turn (Tr. p. 123). Before starting to make said left hand turn appellee looked ahead and observed no automobile approaching from the east and with his arm still extended proceeded to make the turn into Park Avenue (Tr. p. 209). After completing his turn appellee proceeded over and across the center line and inner westbound lane on Fremont Street and was approxi-

mately two-thirds across the outer westbound lane of Fremont Street when the U. S. Army panel truck, driven and operated by defendant, Wanless, approached appellee from the east at a rapid rate of speed (Tr. p. 126), which speed appellee contends was between seventy (70) and eighty (80) miles per hour (Tr. p. 254) and collided with appellee's automobile on the right front side thereof behind the front bumper, knocking appellee's automobile sideways down the hill, approximately fifteen (15) feet and up against the north curb of Fremont Street (Tr. pp. 128, 129). As a result of the collision appellee and his wife and the other occupants of the car were rendered unconscious (Tr. p. 211).

That immediately after the happening of the accident police officers observed that skid marks caused by the Government vehicle extended for a distance of one hundred and two (102) feet easterly from the position of the Government vehicle after the impact (Tr. pp. 98, 101). The force of the impact was so severe that the jump seats of the Government automobile were thrown on the highway (Tr. p. 153).

Wanless first noticed appellee's car when he "topped the hill" (Tr. p. 167), he applied his brakes and the panel truck started to swerve and the brakes squealed (Tr. p. 169). The condition of the brakes of the panel truck were fair to good (Tr. p. 279). At the time Wanless did not observe the bus operated by witness Hartshorn (Tr. p. 278), nor did he observe appellee's extended arm (Tr. p. 278).

Before the accident Walter Penders was a healthy, strong and robust man. As a result of this accident he suffered severe injuries (Tr. pp. 44, 51, 57), necessitating his hospitalization from May 11, 1946 to March 24, 1947 (Tr. p. 45). Appellee's wife, Flora Penders, likewise suffered severe injuries (Tr. pp. 57, 62, 64), necessitating her hospitalization from May 11, 1946, until April 10, 1949, the date of her death. Flora Penders' death was a proximate result of the injuries which she suffered in this particular accident (Tr. p. 64). As a result of the accident, appellee suffered a broken leg, broken arm and severe shock to his nervous system (Tr. p. 212). The injuries suffered by him are permanent (Tr. pp. 212, 214). Appellee and his wife were married in 1905 and during their entire married career they were never separated, save and except for a period of one month (Tr. p. 216).

ARGUMENT.

1. THE TRIAL COURT'S FINDINGS OF NEGLIGENCE IS FULLY SUPPORTED BY THE EVIDENCE.

After a very thorough and complete hearing and after the trial judge had occasion to listen and hear the testimony of the respective parties and the witnesses produced on their behalf and to observe their manner of testifying and demeanor on the stand, the trial Court prepared findings of fact and conclusions of law which were succinct and to the point, a portion of which appellee feels is well worthy of repetition at this point.

"VI. That it is true that on or about the 11th day of May, 1946, at or about the hour of 6:41 p.m. of said day, plaintiff, Walter L. Penders, with Flora Penders as a passenger therein, was driving his 1934 Hupmobile Sedan automobile, then and there owned by said plaintiff, Walter L. Penders, in an easterly direction on said Fremont Street, and at said time was turning northerly into said Park Avenue at the intersection of said Fremont Street and Park Avenue, at which time, and for sometime prior thereto, plaintiff, Walter L. Penders, had extended his arm indicating his intention of making the aforesaid turn; that at said time and place said Carl B. Wanless, acting as the agent, servant and employee of defendant, United States of America, and acting within the course and scope of his authority and employment as such agent, servant and employee, and with the knowledge, permission and consent of said defendant, United States of America, was operating and controlling a United States Army 1941 Chevrolet panel truck in a westerly direction in the outer west bound lane of said Fremont Street; that it is true that at said time said defendant, Carl B. Wanless, was operating the aforesaid automobile at an excessive rate of speed; that it is true that at said time said defendant, Carl B. Wanless, operated said automobile without due care and caution in that although his vision was unobscured, said defendant, Carl B. Wanless, did not observe said plaintiff's automobile until he was approximately 80 feet distant from the intersection of said Fremont Street and Park Avenue; that it is true that said intersection of Fremont Street and Park Avenue was visible for a distance of approxi-

mately 150 to 175 feet to a person approaching said intersection from the westerly direction; that it is true that when defendant, Carl B. Wanless, first observed said plaintiff's automobile, said plaintiff was in the act of completing his turn and was in the outer west bound lane of Fremont Street; that it is true that said defendant, Carl B. Wanless, did not observe plaintiff's extended arm; that it is true that at said time there were no vehicles ahead, abreast or behind said defendant, Carl B. Wanless, in the inner or outer west bound lane; that it is true that defendant, Carl B. Wanless, on first observing plaintiff's said automobile, then and there negligently and carelessly turned the vehicle which he was then and there operating to the right and struck plaintiff's car at the right front portion thereof, at a point north of the northerly line of the outer west bound lane of Fremont Street.

VII. That it is true that by reason of the aforesaid carelessness and negligence of the defendant, Carl B. Wanless, and as a proximate result thereof, the said plaintiff, Walter L. Penders, was caused to be, and he was cut, bruised, lacerated * * *."

Appellant argues that the above findings do not find support in the evidence. However, appellant does concede that the findings of fact of the trial Court cannot be disturbed on appeal unless they are inadequately supported by the evidence. Apparently this is conceded because it is an elementary principle of appellate procedure. It is surprising that appellant has not made further concessions in this regard and

ppellee sincerely believes that if there were any nerit to this particular appeal appellant would likewise readily concede that the question of negligence nd that of contributory negligence are questions of act to be determined by the trial Court. Also it has ong been an established rule of law that where reaonable and impartial persons would reach opposing onclusions as to who contributed to the cause of a articular accident, such question must be left to the rial Court.

Appellant attacks the above findings by arguing hat there is no evidence of excessive speed, and no vidence that Wanless did not maintain a proper ookout or that Wanless was negligent in executing right turn immediately prior to the accident. Apellee will answer appellant's arguments under three uch subdivisions as appellant has set forth its argunent in its opening brief.

Before doing so, however, appellee's counsel conscintiously believes that everything that is stated in ppellant's opening brief is a question of fact to be etermined by the trial Court and were it not for the act that this Honorable Court might believe, if apellee failed to answer, that he concedes to what is tated by appellant, we would not burden the Court vith such a lengthy brief as we are obliged to do nder the circumstances.

Before answering appellant we would like to call o the attention of this Honorable Court rule 52A, Rules of Federal Procedure, which in part reads as ollows:

"Findings of fact shall not be set aside unless clearly erroneous and due regard shall be given to the opportunity of the trial court to judge of the credibility of witnesses."

Also the language used in the following cases:

"The judgment of the lower court which has seen witnesses and heard their evidence is not to be disturbed, except for clear mistake."

Chinn v. Llangollen, 109 Fed. (2d) page 66.

"Where a case is tried by the court without a jury, its findings upon questions of fact are conclusive. It matters not how convincing the argument is that upon the evidence the findings should have been different."

U. S. v. Tyrakowski, 50 Fed. (2d) 766.

"Findings of fact by court cannot be reviewed if there is not substantial evidence to uphold them."

Federal Life Insurance Co. v. Bailey, 13 Fed. (2d) 113.

"The findings of the trial court are presumptively correct and should not be set aside unless clearly erroneous."

Fitch v. Camille, 106 Fed. (2d) 635.

(a) **Excessive speed.**

Appellant complains that finding V (R.T. 21) "says nothing about how Wanless' speed was excessive". He contends that there was conflict in the testimony offered in this regard. Appellant points out such con-

flict on pages 7 and 8 of its opening brief. Counsel for appellant well knows that in view of such conflict the question of speed was one of fact for the trial Court and that the trial judge had the right to believe the testimony of the appellee that Wanless was driving his automobile at the rate of seventy (70) to eighty (80) miles per hour rather than that of the witness, Wanless, who testified he was traveling between thirty (30) to thirty-five (35) miles per hour, but who could not tell how fast he was traveling at the time of the impact (Tr. p. 285).

> "It was also a question of fact whether under the circumstances defendant's car was being driven at a negligent rate of speed."
>
> *Pollind v. Polich,* 78 Cal. App. (2d) 87 at 90.

See, also:

Greenwood v. Summers, 64 Cal. App. (2d) 516;
Gayton v. Pacific Fruit Express, 127 Cal. App. 50, at 57, 58;
Bellon v. Silver Gate Theatres, Inc. (supra).

Counsel for appellant in his argument completely ignores the physical facts surrounding this particular accident. Proof of the consequences of a collision may be considered by the Court in determining the speed of an automobile involved in an accident.

Asbury v. Goldberg, 8 Cal. App. (2d) 70.

An automobile driven at a reasonable rate of speed does not leave skid marks of one hundred and two (102) feet (Tr. p. 98), nor when it collides with another automobile does it cause the latter to be knocked

back sideways fifteen (15) or twenty (20) feet (Tr. p. 128), nor does it cause the damage as shown in plaintiff's Exhibits 17, 18, 19, 20.

Our Courts have held that proof of speed can be ascertained from the circumstances that attend the collision and consider the distance within which the defendant stopped his car,

Skulte v. Ahern, 22 Cal. App. (2d) 460,

and the length of skid marks on the pavement,

Douglas v. Crabtree, 57 Cal. App. (2d) 568,

or skidding with the brakes set and the wheels locked,

Doyle v. Loyd, 45 Cal. App. (2d) 493.

In fact the Courts have gone so far as to state that evidence of such character may be of greater probative force than the statements of witnesses.

Asbury v. Goldberg (supra).

Appellant also contends that Finding V does not state that "excessive speed was the cause of the accident" because the trial Court did not preface excess speed with the words "careless and negligent". Appellant characterizes the expression of the Court in this regard as a kind of "editorial comment" and argues that Finding V does not state that excessive speed was the cause of the accident.

A reading of Finding V discloses that the trial Court found and enumerated the specific acts and actions on the part of the witness, Wanless, which in its opinion constituted acts of negligence. After specifically enumerating said acts and actions of Wanless in the operation of the Government vehicle, in Find-

ing VII (page 23, Transcript of Record), the Court finds all of the acts and actions of Wanless in the previous finding mentioned to be careless and negligent and the proximate cause of the damages suffered by appellee.

The decisions of our Courts are almost uniform in holding that findings are to be interpreted as a whole and, if possible, so as to uphold the judgment and unless there is an irreconcilable conflict between the findings and the negligence as shown by the evidence, the judgment will be affirmed.

> "If a finding is susceptible of two constructions, one of which supports the judgment and the other does not, the former will prevail; and whenever from the facts found, other facts may be inferred which will support the judgment such inference will be deemed to have been drawn. The findings of fact by the trial Court must receive such a construction as will uphold rather than defeat its judgment."
>
> *Clyde Equipment Co. v. Fiorito,* 16 Fed. (2d) 106, 107.

Where a trial Court's findings fully covered controverted issues of fact, they must stand on appeal, if supported by competent evidence of probative value unless they are clearly erroneous.

> *Lincoln Nat. Life Ins. Co. v. Mathisen,* 150 Fed. (2d) 292.

> "The trial court is not required to make findings of all the facts. It need find only such ulti-

mate facts as are necessary to reach a decision in the case."

Shelly Oil Co. v. Holloway, 171 Fed. (2d) 670, 673.

"Findings of fact should be 'a clear concise statement of ultimate facts and not a statement, report or recapitulation of evidence from which such facts may be found or inferred.' "

Brown Paper Mill Co. v. Quinn, 134 Fed. (2d) 337, 338.

See, also:

American Ins. Co. v. Scheufler, 129 Fed. (2d) 143;

Miller v. Needham, 122 Fed. (2d) 710.

In the case of *Philco v. F. & B. Mfg. Co.,* 170 Fed. (2d) 958, the Court said:

"These are findings of fact based upon evidence produced before the trial court, in part controversial in character. Several witnesses appeared; of their credibility the court had full opportunity to judge as they testified in open court. In such a situation we are not at liberty to disturb the findings of fact unless we can say as a matter of law that the court's interpretation of the evidence is clearly erroneous."

Appellee contends that the last quoted language is most applicable to the facts of the present case and respectfully urges that they fully cover the issues involved and there is no merit whatsoever to the position taken by appellant.

(b) Wanless' lookout.

Appellant contends that Wanless' failure to keep a proper lookout is not given as a cause resulting in the collision. Again appellant's counsel, with nothing but the cold record of this case before him, is asking this Honorable Court to adopt his conclusions taken from the record rather than that of the trial judge who conducted the trial, heard the evidence and observed the witnesses. And again we are confronted with the question of fact based on conflicting testimony.

An examination of the record will disclose that on the day in question, Wanless, a nineteen (19) year old boy (Tr. p. 269), testified he was driving at thirty-five (35) or forty (40) miles per hour (Tr. p. 266), first observed appellee's car one hundred and fifty (150) to one hundred seventy-five (175) feet away. In another instance, Wanless testified that he first saw appellee's car eighty (80) feet from the intersection of Park Avenue and Fremont Street (Tr. p. 267). At that time he was traveling in the outside lane (Tr. p. 276). When he first observed appellee's automobile, appellee's automobile was then "better than half way" into the outside lane (Tr. p. 275). He did not observe the bus being operated by the witness, Hartshorn (Tr. p. 278). He did not observe appellee's extended arm (Tr. p. 278). Wanless had driven over Fremont Street for a period of four (4) months and was familiar with the contour of the highway in the vicinity of Park Avenue and Fremont Street.

We call to the attention of this Honorable Court the above testimony not for the purpose of endeavoring to answer the argument of appellant's counsel in its opening brief, but solely to indicate and show that the question of whether Wanless maintained a proper lookout was a question of fact for the trial Court and that the Court having determined the matter it is now no concern of this Honorable Court, unless this Honorable Court feels that the finding made by the trial Court in this regard has no support in the evidence.

Section 510 of the Vehicle Code of the State of California reads as follows:

> "No person shall drive a vehicle upon a highway at a speed greater than is reasonable or prudent having due regard for the traffic on, and the surface and width of, the highway, and in no event at a speed which endangers the safety of persons or property."

Under Section 510 of the Vehicle Code appellee contends, in view of the contour of the road and the inability of Wanless to observe the intersection of Park Avenue and Fremont Street for a greater distance than 150 to 175 feet, it was his duty to regulate and control his automobile accordingly and to maintain a proper lookout. It was his duty under the law to anticipate the possibility of approaching automobiles beyond the point of his vision.

Fleming v. Flick, 140 Cal. App. 14.

(c) Wanless' right turn.

Under this heading appellant again wants this Honorable Court to disregard the findings of the trial Court and examine the photographs introduced into evidence by appellee as plaintiffs' Exhibits 17, 18, 19, and 20, and from its argument draw from said photographs a conclusion different than that reached by the trial Court in this particular case.

Here again, appellant is arguing a purely factual situation. It is not the province of this Court to settle conflicts in the evidence or to determine questions of credibility.

Campana Corporation v. Harrison, 114 Fed. (2d) 400.

> "It is an elementary, but often overlooked, principle of law, that when a verdict is attacked as unsupported, the power of the Appellate Court begins and ends with a determination as to whether there is any substantial evidence, contradicted or uncontradicted, which will support the conclusion reached by the jury. When two or more inferences can be reasonably deduced from the facts, the reviewing court is without power to substitute its deductions for those of the trial court."

Crawford v. Southern Pacific Company, supra.

Under the record in this particular case the court could have found that both parties were responsible for this particular accident or that appellee was guilty of contributory negligence. However, the trial Court found that appellee was free from any negligence and appellant was guilty of negligent operation of its

automobile, which was responsible for the accident. If there is any evidence in the record or any reasonable inference to be drawn from such evidence to sustain the finding of the trial Court then this Honorable Court will not disturb those findings.

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2. APPELLEE WAS NOT GUILTY OF CONTRIBUTORY NEGLIGENCE.

Appellant contends under point 2 of its brief that appellee was guilty of contributory negligence as a matter of law. This contention is based, first, on the photographs of plaintiff's Exhibits 17 to 20, inclusive, which photographs appellant contend show the collision to have been head on and, secondly, that the evidence conclusively established that appellee was violating section 540b of the California Vehicle Code at the time of the accident. The claim, *advanced for the first time on appeal,* that appellee was guilty of contributory negligence as a matter of law *is clearly an afterthought.* Contributory negligence on the part of appellee was pleaded in the answer in general terms. The case was tried upon the theory that any contributory negligence of appellee was a question of fact for the trial Court, just as was the question of any negligence of the appellant. The record will disclose that no motion was made by appellant for a nonsuit at the close of appellee's case. It will be noted that appellant did not contend that any alleged contributory negligence of appellee as a matter of law precluded the case being submitted to the Court

or its decision, nor at any time did appellant urge hat it was entitled to a judgment by reason of appellee's contributory negligence. No mention prior to his appeal was ever made of Section 540b of the California Vehicle Code.

The law is well settled that the question of contributory negligence is ordinarily one for the trial ourt. It is only where the deduction to be drawn om the evidence points unerringly to the negligence f appellee contributing to his own injuries that the uestion becomes one of law. The decisions by the ourts throughout the country are so numerous on his subject that appellee deems citation of authority nnecessary.

The case having been submitted to the Court for ecision and no complaint being made on this appeal s to the admission of evidence, we contend that the etermination by the trial Court was decisive as to he controversy as far as this Honorable Court is conerned. In this regard we call to the Court's attention he following language found in *Lavender v. Kurn*, 27 U. S. 645, 90 Lawyer's Ed. 917, at 923:

> "Whenever facts are in dispute or the evidence is such that fair minded men may draw different inferences, a measure of speculation and conjecture is required on the part of those whose duty it is to settle the dispute by choosing what seems to them to be the most reasonable inference. Only when there is a complete absence of probative facts to support the conclusion reached does a reversible error appear, but where, as here, there is an evidentiary basis for the jury's verdict, the

jury is free to discard or disbelieve whatever facts are inconsistent with its conclusion. And the Appellate court's function is exhausted when that evidentiary basis becomes apparent, it being immaterial that the court might draw a contrary inference or feel that another conclusion is more reasonable."

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3. THE TRIAL COURT'S AWARD OF DAMAGES WAS NOT EXCESSIVE.

Appellant contends that the damages awarded appellee for his injuries and the death of his wife are excessive. As heretofore stated, although advanced in years appellee, prior to the accident, was a healthy, strong and robust man. As a result of this accident he suffered a fracture of the left wrist and a fracture of the left tibia into the knee joint (Tr. p. 44). X-rays showed the fracture of the left wrist to be a comminuted one (Tr. p. 46) and compacted to a degree (Tr. p. 47). As a result of the fracture appellee's left wrist is now deformed in that the bone protrudes (Tr. p. 213) and that deformity is permanent (Tr. p. 51). Appellee has lost control of his fingers as a result of the wrist injury (Tr. p. 212). The fracture of the wrist left him with a shortening of the bone, with the wrist twisted clear over (Tr. p. 50). Appellee's arm was in a cast for seven (7) months (Tr. p. 212). He was obliged to wear a supporting splint until shortly before the trial (Tr. p. 49). Because of the leg fracture his entire left extremity, from just below the hip, including his knee, ankle and foot,

were immobilized in a splint and kept so for approximately four (4) months (Tr. p. 53). Although a fair union of the leg fracture was accomplished appellee will always have a painful joint (Tr. pp. 53, 54). After the removal of the splint from the leg appellee was obliged to wear an elastic support until a few months prior to the trial (Tr. p. 214). As a result of the fracture the knee joint protrudes and causes appellee pain all the time (Tr. p. 214). Appellee was confined in the hospital from May 11, 1946, to March 24, 1947 (Tr. p. 54). Appellee and his wife, Flora Penders, were very closely and intimately associated during their entire married life. They were married thirty-five (35) years (Tr. p. 216), and during that period of time were together constantly, save and except on one occasion when they were separated for about one month (Tr. p. 216). They were always together and did considerable traveling. Mrs. Penders during her lifetime maintained the household of appellee, giving to him the care and attention of a good and dutiful wife.

An examination of the record reveals that the injuries sustained by appellee were serious and are permanent in nature and that the award of fifteen thousand dollars ($15,000.00) for his disability is not excessive. When one is deprived of the association, care and loving attention of a good and dutiful wife, after thirty-five (35) years of married life, an award of fifteen thousand dollars ($15,000.00) is likewise not excessive.

The responsibility as to the question of excessive damages is primarily with the trial Court and the Appellate Court may not interfere unless the award is so disproportionate to the injuries as to indicate that it was not the result of the cool and dispassionate consideration of the jury.

Holden v. Patten-Blinn Lumber Co., 7 Cal. App. (2d) 220;

Holder v. Key System, 88 Cal. App. (2d) 925.

It must be borne in mind that this award of injuries was given by a trial judge and not by a trial jury, and so appellant is not in a position to complain of sympathy or prejudice. The mere fact that the amount of the award is larger than would have been given by the reviewing Court if the assessment of damages had been within its province is not ground for disturbing the verdict.

Collins v. Jones, 131 Cal. App. 747.

In determining the question of damages the reviewing Court should take into consideration changing conditions in the purchasing power of money.

O'Meara v. Haiden, 204 Cal. 254;

Sim v. Weeks, 7 Cal. App. (2d) 28.

As stated in *Anstead v. Pacific Gas & Electric Co.,* 203 Cal. 634:

> "The verdicts of juries are rarely interfered with upon this ground and only when, as has been repeatedly stated, the verdict is so grossly excessive as to suggest at first blush passion, prejudice or corruption on the part of the jury."

This Honorable Court recently, in the case of *Guthrie v. Southern Pacific,* Action No. 12,164 of said Court, in a decision of this Court written by Judge Pope, held that an Appellate Court had no power to modify a verdict on the ground that it was excessive. Judge Pope stated:

> "There is an abundance of authority in the decisions of the federal courts that in this situation an appellate court has no power to do anything about such a verdict. The view most commonly expressed is that stated by Judge Goodrich, for the Court of Appeals of the Third Circuit, in Scott v. Baltimore & O. R. Co., as follows: 'The members of the Court think the verdict is too high. But they also feel very clear that there is nothing the Court can do about it * * *' 'A long list of cases in the federal courts demonstrates clearly that the federal appellate courts, including the Supreme Court, will not review a judgment for excessiveness of damages even in cases where the amount of damages is capable of much more precise ascertainment than it is in a personal injury case.' "

In support of the above quoted language this Honorable Court referred to the following cases:

Feltman v. Sammond, 166 Fed. (2d) 213 (1947, Dist. of Columbia C.C.A.);

Chicago & NW. Ry. v. Green, 164 Fed. (2d) 55 (1947—8th Circ.);

Behrman v. Sims, 157 Fed. (2d) 862 (1946—Dist. Col.);

Herzig v. Swift Co., 154 Fed. (2d) 64 (1946—2nd Circ.);

Reid v. Nelson, 154 Fed. (2d) 724 (1946—5th Circ.).

CONCLUSION.

This case was fully and fairly tried. The trial Court found in favor of appellee and against the appellant. After judgment the appellant did nothing in the way of a motion for new trial, or otherwise, to correct the alleged error that they now urge upon appeal. It is respectfully submitted that no reason exists for disturbing the judgment of the trial Court and that the same may be affirmed.

Dated, San Francisco, California,
May 1, 1950.

Respectfully submitted,
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